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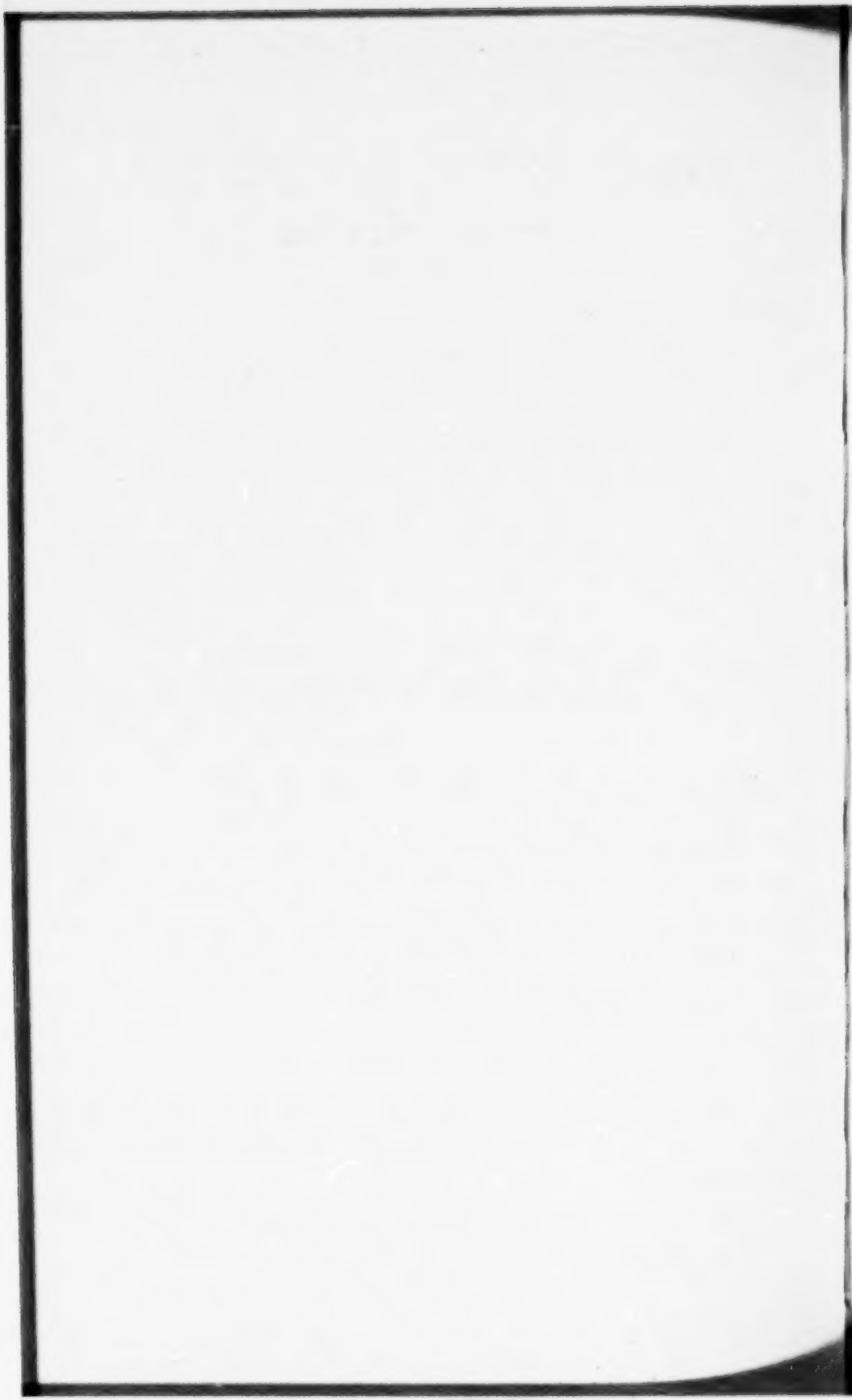

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 433

DAVID HODGE AND WILBUR G. MOFFITTE,
Appellants,

vs.

THE TULSA COUNTY ELECTION BOARD, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATEMENT OF BASIS ON WHICH APPELLANTS CONTEND THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW ON APPEAL THE ORDER OR DECREE DENYING THE PRELIMINARY INJUNCTION APPEALED FROM, AS REQUIRED BY SUPREME COURT RULE 12

Preliminary Statement

We believe the following brief statement of the case is essential to a full understanding of the jurisdictional statement:

The election boards of Oklahoma are defined in Tit. 26 O. S. 1941 Secs. 11, 12, 13, 21 and 22. The particular section

of the Oklahoma Law involved in this action is found in Tit. 26 O. S. 1941 Sec. 162a. The pertinent portion of which is as follows:

> "Every candidate shall state in his notification and declaration his race. Any candidate who is other than of the White race, shall have his race designated upon the ballots in parenthesis after his name. This provision shall apply both to Primary and General Elections or either of them."

The plaintiffs on the 23rd day of September, 1948, by peti tion requested the County Election Board to strike the word "Negro" from the ballots to be used in the General Election to be held in Tulsa County, on 2 November, 1948.

This request being refused, plaintiffs on the 28th day of September, 1948, filed a complaint in the United States District Court for the Northern District of Oklahoma, seeking a preliminary injunction restraining the County Election Board from placing the word "Negro" following the names of the plaintiffs on the ballots that were to be used in the election, and asking that under the provisions of Tit. 28 U. S. Code Sec. 281 and 284, that a three Judge Court be convened to enjoin said election board from carrying out its announced intention.

Thereafter a Three Judge Court was convened (28 U. S. C. Sec. 2284, Judicial Code). The Three Judge Court denied the temporary injunction and the case is in this court on appeal therefrom. A copy of the Journal Entry of Judgment is attached hereto, marked "Exhibit A", and made a part hereof.

Jurisdictional Statement

Pursuant to Supreme Court Rule 12, appellants filed this statement particularly disclosing the basis on which they contended that this Court has appellate jurisdiction to

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review on appeal the order or decree appealed from, and say:

1. The statute which sustains the jurisdiction of this Court to determine this appeal is Sec. 1253, Tit. 28 U. S. Code, which provides that when a specially constituted District Court of the United States composed of three Judges assembled under Sec. 2284 grants or denies, after notice and hearing, an interlocutory or permanent injunction in any civil suit action, suit or proceeding required by any Act of Congress to be heard and determined by a District Court of Three Judges, the party or parties aggrieved may appeal to the Supreme Court from said order.

2. On the 7th day of October, 1948, a specially constituted United States District Court for the Northern District of Oklahoma composed of three Judges entered an order or decree denying a preliminary injunction to these appellants and this appeal is from that order. The petition for appeal was filed by these appellants with the Clerk of the United States District Court for the Northern District of Oklahoma, on the 28 day of October, 1948.

3. The lower court filed findings of fact and conclusions of law but as far as is known to appellants did not file or deliver any opinion at the time of denying the temporary injunction or at any other time.

4. This action does involve the validity or constitutionality of a State Statute, said statute being Tit. 26, Sec. 162a, the pertinent portion of which is as follows:

> "Every candidate shall state in his notification and declaration his race. Any candidate who is other than of the White race, shall have his race designated upon the ballots in parenthesis after his name. This provision shall apply both to Primary and General Elections or either of them,"

and said action was brought to enjoin the enforcement of the provisions of said statute, and to have said statute declared unconstitutional.

5. The plaintiffs contended that the defendants acting pursuant to the Oklahoma Statutes had established and are maintaining a policy, custom and usage of denying qualified Negro Candidates equal protection of the laws by refusing to list their names including the names of these plaintiffs on the ballots without reference to race.

6. Because of the matters set out above the appellants contend the court erred as a matter of law in not granting the interlocutory injunction.

7. The appellants further contend that the court erred in holding that the evidence on the part of the plaintiffs was insufficient to show that the plaintiffs were unduly burdened by the use of the word "Negro" being placed following their names on the ballots.

8. The cases believed to sustain the jurisdiction of the Supreme Court of the United States to determine this appeal and reverse the order denying the temporary injunction are as follows: *Lane* v. *Wilson*, 307 U. S. 268, 59 Supreme Court 872; *Nixon* v. *Herndon*, 273 U. S. 536, 47 Supreme Court 447.

Dated this 28 day of October, 1948.

(S.) Amos T. Hall,
107½ N. Greenwood,
Tulsa 3, Oklahoma;
Primus C. Wade,
124½ N. Greenwood,
Tulsa 3, Oklahoma,
Attorneys for Plaintiffs.

EXHIBIT "A"

Findings of Fact and Conclusions of Law

PRELIMINARY STATEMENT

The plaintiffs bring this class action challenging the constitutionality of Section 162(a) of Title 26 O. S. A. 1941, which pertinently provides in substance:

> That in both primary and general elections, or either of them, in the State of Oklahoma, any candidate who is of other than the white race shall have his race designated on the ballots in parenthesis after his name.

The plaintiffs are both members of the negro race and the nominees of their respective political parties to the same office of justice of the peace in Division #5, District 4, Tulsa County, Oklahoma. The Tulsa County Election Board and the State Election Board, respondents herein, will, in pursuance of the challenged Oklahoma statute, designate the race of the plaintiffs upon the ballots in the November election by placing in parenthesis opposite their names the word "negro".

The plaintiffs each, for himself and for all others similarly situated, contend that to comply with the statutory requirements is to impose a burden upon them and all members of their race which is not imposed upon any other candidate for political office or upon members of any other race, thus depriving them of the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States. We are asked to declare the state statute unconstitutional and to temporarily enjoin the respondents from compliance therewith and, upon a full hearing, permanently enjoin compliance with the statute.

The question for decision is, therefore, whether the placing of the word "negro" in parenthesis opposite the names of these plaintiffs on the ballots for the November general election, because they are members of the negro race, deprives them of the equal protection of the laws.

Findings of Fact

1. The court finds in accordance with the stipulation filed of record that the plaintiffs David Hodge and Wilbur G. Moffitte have compiled with all election laws regarding electors in the State of Oklahoma and have qualified as candidates for the office of justice of the peace in Division #5, District 4, Tulsa County, Oklahoma, on the Republican and Democratic tickets respectively in the general election to be held November 2, 1948. Both parties are candidates for the same office and both are members of the negro race. In qualifying as candidates for the office they seek, each filed notification and declaration of candidacy as required by Section 162 O. S. 1941, in which they stated:

"that my race is negro;
white or negro

that the name of the plaintiff Hodge was placed on the July 6, 1948, regular primary election ballot followed by the word "negro" in parenthesis, in compliance with Section 162(a) supra, and that the name of the plaintiff Moffitte was not placed on the primary ballot in this manner only because he had no opponent in the primary election.

2. It is the duty of the Tulsa County Election Board to prepare, distribute, collect and tabulate the ballots on which these plaintiffs' names will appear in the November 2, 1948 general election to be held in Tulsa County, Oklahoma, and that since the enactment of the challenged statute the respondent election boards in their predecessors in office have, in compliance with the said statute placed, following the names of all negro candidates on ballots in elections, primary and general, the word: "negro" and that the said defendants have, in pursuance to the said statute, indicated their intention of designating the race of these plaintiffs on the ballots to be voted in the coming general election.

3. On the 23rd day of September, 1948, the plaintiffs each for himself petitioned the respondent election boards not to place the word "negro" on the ballots following their names and the Tulsa County Election Board, acting pursuant to the advice of the respondent State Election Board, overruled the petition and indicated their intention of fol-

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lowing the provision of the statute, and will do so unless restrained.

CONCLUSIONS OF LAW

1. Since this suit is brought to redress the alleged deprivation of rights guaranteed by the Constitution and laws of the United States, this court has jurisdiction of the subject matter regardless of diversity of citizenship or amount in controversy. Hague *v.* C. I. O., 307 U. S. 496; Douglas *v.* City of Jeannette, 319 U. S. 157; Board of Education *v.* Barnett, 319 U. S. 624. And since a temporary injunction is sought, this three-judge court has jurisdiction of the subject matter.

2. The Court holds that the right to become a candidate for and hold state office is a state not a federal right protected by the federal constitution. See Snowden *v.* Hughes, 321 U. S. 1, p. 7.

3. The plaintiffs both being members of the negro race and candidates for the same office, no discrimination against color or race can be shown by the requirement that each shall have his race designated in parenthesis on the ballot opposite his name. There can, therefore, be no unconstitutional discrimination within the meaning of the equal protection clause of the Constitution of the United States.

4. The Court further holds that compliance with the statute in issue does not impose a burden upon the plaintiffs or any member of their race similarly situated which deprives them of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

5. The temporary injunction is therefore denied, and exceptions allowed.

Dated this 7th day of October, 1948.

(S.) ALFRED P. MURRAH,
United States Circuit Judge;
(S.) EDGAR S. VAUGHT,
United States District Judge;
(S.) ROYCE H. SAVAGE,
United States District Judge.

No. 433. HODGE ET AL. *v.* TULSA COUNTY ELECTION BOARD ET AL. Appeal from the United States District Court for the Northern District of Oklahoma. *Per Curiam:* The judgment is vacated and the case is remanded with directions to dismiss the cause as moot. *Mills* v. *Green*, 159 U. S. 651; *United States* v. *Anchor Coal Co.*, 279 U. S. 812. *Amos T. Hall* for appellants. Reported below: — F. Supp. —.